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(1877) 05 AHC CK 0008

Allahabad High Court

Case No: None

Lalji Mal

APPELLANT

Vs

Param Singh

RESPONDENT

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Date of Decision: May 28, 1877

Citation: (1875) ILR (All) 403

Hon'ble Judges: Turner, J; Oldfield, J

Bench: Division Bench

Final Decision: Allowed

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### Judgement

Turner, J.

The respondent was the owner of a ten biswas share in each of the mauzas Mayola, Dudhrajpur, and on the 24th December 1853 he executed a deed of conditional sale transferring these properties to the appellant for an alleged consideration of Rs. 1,000, repayable with interest at twelve per cent, in four years. The deed declared that possession had been given to the conditional vendee. In 1860 the appellant caused a notice of foreclosure to be issued, and on the 28th June 1861, he obtained an ex parte decree for possession.

2. On the 18th July 1861, Nathmal Das obtained a decree for money against the respondent, and in execution of that decree he attached the rights and interests of the respondent in the property above mentioned. The appellant intervened, and on his objection the property was released on the 26th January 1865. Nathmal Das then instituted a suit to contest the order. He alleged that the conditional sale-deed of December 1853 was fraudulent and collusive. The appellant and respondent were both made parties to this suit. The appellant appeared and contended that the mortgage was valid, and he also pleaded the foreclosure and decree obtained in 1861. The respondent did not appear. The Principal Sadr Amin held that Nathmal Das had failed to establish his case, and dismissed the suit, and on appeal his decree was affirmed.

3. The first occasion on which the appellant applied for execution of his decree of the 8th June 1861, was on 25th April 1864. On the 28th June 1864, it was ordered that notice should issue, and the appellant's fee be deposited. It does not appear whether notice was served: the proceedings were struck off the file on the 11th July 1864, because the appellant's fee had not been deposited.

4. The next applications were made on the 19th June 1865, and on the 10th August 1866, but the decree-holder did not proceed with them. On the 24th June 1869, another application for execution was put in, and notice issued. On the 10th July the decree-holder informed the Court that, inasmuch as arrears of revenue were still due, he did not desire to obtain possession, and prayed that the proceedings might be struck off the file. On the 13th July 1869, the respondent put in a petition in which he alleged the decree was collusive, and that the applicant was, in fact, a trustee for him.

5. On the 2nd March 1870, the appellant presented another application for execution, but immediately afterwards, he informed the Court he did not desire to proceed with it, and that, if any settlement took place, a *sulelmamah* would be filed.

6. At last, in 1872, the appellant seriously took proceedings to execute his decree and obtained possession. The respondent resisted the application. He alleged, as he alleges in this suit, that in order to prevent his eldest son, by his first marriage, from obtaining the property, he had arranged with the appellant, his intimate friend, to make a pretended transfer of the property to him, and that in pursuance of this arrangement he executed the deed of conditional sale of December 1853, that in fact no money passed as consideration for the deed, that in 1856 the appellant, at his instance, executed a deed acknowledging the respondent's title to the property, that the decree of 1861 was also obtained to conceal the true ownership of the property, and that he had all along remained in possession, and dealt with the property as his own, to the knowledge of the appellant. The Munsif allowed the objection, and dismissed the application for execution. The Principal Sadr Amin reversed the Munsif's order, and the High Court affirmed the Principal Sadr Amin's order, on the ground that it was not competent to a Court executing a decree to annul the decree. The appellant consequently obtained possession.

7. The respondent then instituted the suit which is now before this Court in appeal. He averred that the deed of conditional sale had been executed without consideration, and with a view to defeat a claim which he thought might be made by his son by his first wife, that in prosecution of the design to conceal the ownership of the property he contrived the foreclosure proceedings, and the suit which customarily follows such proceedings, that in fact it was not intended the property should pass to the appellant, that he was a mere trustee, *ismfarzi*, for the respondent, that the respondent had, notwithstanding the proceeding above referred to, remained in possession of the property, and exercised acts of ownership, until by the execution of the decree, in fraud of the respondent, the

appellant obtained possession. The respondent also relied on the terms of an agreement, which he asserted had been executed by the appellant on the 16th January 1856, and which is in the following terms:

I, Param Singh, son of Bhup Singh, by caste Tat, and resident of mauza Jahangirpur, pargam, Thakurdwara, do hereby declare that whereas Lalji Mal, a resident of mauza Myola, has executed in my favour an ismjarzi deed of conditional sale, dated the 24th December 1853, in respect of a ten biswa share in each of the mauzas Mayola aforesaid and Dudhrajpur in pargana Thakurdwara, because Ganga Ram, the son of the said Lalji Mal, by his first wife, deceased, quarrels with him, and is trying to get the said share from him. I record and agree that even if I, as a matter of expediency, obtain a decree by suing on the said deed of conditional sale, or if I should try directly or indirectly, privately or through the Court, to take or obtain possession of the property entered in the said deed of conditional sale, or if any of my heirs should wish to take or obtain possession, I, or my heir, or successor, shall not, according to the agreement, be competent to be the owner of the said property, and that should I in contravention of the terms of this agreement obtain possession, or endeavour to obtain possession, all the proceedings connected with the sale and the foreclosure shall be deemed invalid according to this instrument. I have, therefore, executed this agreement that it may serve as evidence.

(Sd.) Paeam Singh, with his own pen.

8. The stamp paper on which this agreement is written bears, an endorsement to the effect that it was purchased by the appellant, a few days before the date of agreement.

9. The appellant replied that the ex parte decree obtained on the 8th June 1861, the order obtained by him when objecting to the execution of Nathmal's decree, the dismissal of the suit brought against him by Nathmal, and the rejection of the respondent's objection when he took out execution of the decree of 1861, estopped the respondent from maintaining the suit, and that the claim, involving the supersession of the conditional sale deed executed in 1856, and the decree of 1861, was barred by limitation. On the merits, the appellant pleaded that the deed of conditional sale had been executed for the consideration therein expressed, and he lionied the execution of the agreement of 1856, and accounted for the stamp endorsement by asserting that in 1869, he had been attacked by Kesri, the brother-in-law of the respondent, and had been robbed of a bundle of papers from which a blank paper, bearing a stamp, might have been extracted and the agreement fabricated. The Subordinate Judge overruled the defences set up on points of law, and on the issues of fact, while he considered the appearance of the agreement suspicious, he considered the proof of its execution, on the whole, trustworthy, and apart from the agreement, adopting the reasons given by the Munsif in support of his order in April 1873, the Subordinate Judge declared lie entertained no doubt that the deed of conditional sale, the foreclosure, and decree

for possession, were obtained by collusion, and he pointed out that this was admitted by Azmat Ali, a witness, who had been summoned by the appellant. The Subordinate Judge, considering that both parties had been parties to a fraud, nevertheless held that the appellant ought not to obtain the benefit of the further fraud he had practised on the respondent, and, therefore, he passed a decree in favour of the respondent. In appeal, it is contended on the part of the appellant that the suit is not maintainable in that the respondent cannot be allowed to set up his own fraud, but is bound thereby; that the decree of June 1861, having become final, the suit is barred; that inasmuch as the claim involves the setting aside of the decree of 1861, it is barred by limitation; that the execution of the deed of conditional sale for consideration is proved; that the alleged agreement of 1856 is false and fabricated, and that the decree of 1861 was not obtained in collusion with the respondent.

10. Before entering on the question of law, it will be more convenient to determine the question of fact raised in the appeal. We see no reason to dissent from the conclusion at which the Subordinate Judge has arrived as to the facts of the case. (The learned Judge after discussing the evidence relating to consideration proceeded as follows:)

11. On the facts, then, found by the Court below and by this Court, is the respondent entitled to relief? That the suit is not barred by limitation is clear. The cause of action alleged by the respondent is the possession obtained by the appellant in 1875. According to the averments of the respondent, no cause of action accrued to him until the appellant disavowed the trust, and proceeded to obtain possession of the property, against the will of the respondent. The mere proceeding to keep alive the decree, would not be a disavowal of the trust. The appellant seriously sought to execute his decree in 1872, and limitation ought not to be computed from an earlier date than that application; if the suit is to be regarded as a suit not merely for possession, but for a declaration that the conditional sale deed was not intended to pass the property, and that the decree should not operate to injure the right of the respondent, in which view of, the suit, six years is the period prescribed; or if, by rejecting as surplusage the claim for the invalidation of the conditional sale deed, the suit be, as we think it should, a claim for possession, the period of limitation is 12 years, to be computed from the date on which possession was obtained in execution of the decree of 1861, which could not have happened till the Munsif's order was reversed by the Judge in 1873; consequently, in either view, the suit instituted in July 1875 was not barred by limitation.

12. We have next to determine whether, on the facts found, the respondent was entitled to maintain the suit. Four several issues arise on this point. Is he estopped by the execution of the deed of conditional sale from asserting that it was executed, not to secure the repayment of a loan, but for the purpose of creating an apparent title in the appellant? Is he estopped by the decree obtained after foreclosure in

1861? Is he estopped by the judgment in the suit brought by his creditor against the respondent and the appellant? and, lastly: Is he estopped by the circumstance that he is obliged to have recourse to the Court for relief, by reason of his attempt to hinder, or defeat, the possible claim of a third party?

13. In this country where ismfarzi transactions are so common, and when they have been so commonly recognized by the Courts, we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from showing the truth. That the respondent may show that nothing was due on the deed, that, certainly, if he were defendant, he would not be estopped from showing the real truth of the transaction, we have authority in *Ram Saran Singh v. Musammnt Ram Peary* 13 Moo. I.A. 551, where the defendant, a widow was allowed to prove, in answer to a claim brought by her brother on a deed of conditional sale, that the deed was concocted by her and her brother to defeat the claim of her husband's heirs. If the party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity, and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument; but where the question arises between parties, or the representatives in interest of parties, who, at time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice, in this country, will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth. We hold that the respondent is not estopped by the deed from showing the nature of the transaction.

14. In the precedent already cited, it was also ruled that a pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them, still less can it be held that a defendant is estopped by a plea which he does not raise, but which is raised by a co-defendant. The dismissal of the creditor's suit on the appellant's plea, does not then estop the respondent from questioning the truth of the plea.

15. Nor is the decree of 1861 a bar to the suit. The question now raised is whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if

executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit; consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to insist upon the agreement, and on the strength of it to recover back possession from the appellant, unless he is precluded by the plea which we have still to determine.

16. The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court finding a man embarrassed by a deceit, to which he was himself a party, will not interfere to relieve him from the consequences, must not be accepted without qualification. The English Court of Exchequer in *Bowes v. Foster* 27 L.J. N.S. 262, allowed a plaintiff to recover from the defendant goods which he had deposited with the defendant, in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing to him a priced invoice of the goods and a receipt for the price; the Court held that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the Court, the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned, the foreclosure made the sale absolute, the decree awarded possession, but had not the decree been executed, the property would have remained the property of the respondent; the parties *ex-hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree, a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from *Bowes v. Foster* 27 L.J. N.S. 262, but, if it be distinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us, the respondent is entitled to rely on the agreement. The respondent may then say, let it be granted that a conditional sale was executed in favour of the appellant, that a right of foreclosure was about to accrue to him, he promised me that if I consented to allow the foreclosure to proceed, and a decree in the subsequent suit to pass by default, he would not execute the decree, or if he did execute it, he would deliver possession to me. I accordingly neither opposed foreclosure, nor pleaded to the suit, and I now claim re-delivery of the property. It appears to us that, under such circumstances, the parties could not be held to be *in pari delicto*, and the respondent would be entitled to succeed.

17. We have arrived at this conclusion, not without considerable hesitation, and if the value of the property is sufficient, and the appellant desires it, we consider that leave to appeal to the Privy Council should be granted. We affirm the decree of the Court below, but, under the circumstances, we direct each party to bear his own costs.